

**MINUTES OF THE OPEN SESSION
OF THE RHODE ISLAND ETHICS COMMISSION**

June 3, 2008

The Rhode Island Ethics Commission held its 11th meeting of 2008 at 9:00 a.m. at the Rhode Island Ethics Commission conference room, located at 40 Fountain Street, 8th Floor, Providence, Rhode Island, on Tuesday, June 3, 2008, pursuant to the notice published at the Commission Headquarters and at the State House Library.

The following Commissioners were present:

**James Lynch, Sr., Chair James V. Murray
Barbara R. Binder, Vice Chair Frederick K. Butler*
Ross Cheit, Secretary Deborah M. Cerullo SSND
Richard E. Kirby J. William W. Harsch**

Also present were Kathleen Managhan, Commission Legal Counsel; Kent A. Willever, Commission Executive Director; Katherine D'Arezzo, Senior Staff Attorney; Staff Attorneys Jason Gramitt, Dianne L. Leyden and Esme DeVault; and Commission Investigators Steven T. Cross, Peter J. Mancini and Steven Branch.

At approximately 9:05 a.m., the Chair opened the meeting. The first order of business was a motion to approve minutes of the Open

Session held on May 20, 2008. Commissioner Cheit noted a correction on page seven of the draft minutes. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Murray, it was unanimously

VOTED: To approve the minutes of the Open Session held on May 20, 2008, as corrected.

The next order of business was a “Class Exception” Workshop Session: Discussion regarding R.I. Gen. Laws § 36-14-7(b) and Public Comment thereon. Chair Lynch imposed a fifteen minute time limit on all individuals who signed up to speak. Staff Attorney Gramitt advised that Staff Attorney DeVault prepared an objective memorandum and spreadsheet detailing research into other states’ versions of the “class exception.” Commissioner Cheit complimented Staff Attorney DeVault on her informative memorandum. The first individual who signed up to speak was Robert A. Benson, Jr., a member of Operation Clean Government’s (OCG) Board of Directors. Mr. Benson addressed the Commission and noted that conflicts of interest are against the law in the federal government. He stated that the class exception allows legislators to make laws impacting the groups to which they belong.

***Commissioner Butler arrived at 9:14 a.m.**

Mr. Benson detailed Rhode Island’s history and emphasized the

importance of avoiding conflicts of interest in order to maintain the public trust. He informed that three separate reports ranked Rhode Island as the most corrupt of the New England states, prior to John Celona and Gerard Martineau pleading guilty. According to OCG's research, there are twenty-seven states with class exceptions. He stated that there are seventeen states with part-time legislatures, and only eleven have class exceptions. He suggested that elimination of the class exception would not lead to disenfranchisement. Mr. Benson pointed out that in 1991 the Rhode Island Supreme Court affirmed the Commission's power to enact ethics laws. He further noted that the class exception is impacting corruption cases brought by the federal government under "Operation Dollar Bill," specifically referencing Judge Lisi's instructions to the jury regarding section 7(b) in the trial of Carlos Ortiz and John Kramer.

The next speaker to address the Commission was former State Senator John M. Roney, Esq. Senator Roney stated that, as the Senate Parliamentarian, he wished to provide a legislative perspective and urged the Commission to be cautious. He reminded the Commission of the merits of maintaining the status quo, as he has not heard the Commission as a whole articulate discomfort with administration of the current rule. He noted that the legislature has articulated the class exception and left it to the Commission to develop case law through its advisory opinions, which he suggested is an important reason not to change the rule.

Senator Roney also reminded the Commission of the lessons of the past, particularly where the Commission adopted Regulation 5014 in 1995, over the objection of its staff and its legal consultant. As a result, he advised that the Rhode Island Supreme Court issued a strong opinion in 1999 which limited the Commission's powers. He emphasized that the Commission has extraordinary power as nine non-elected individuals who can tell the legislative and executive branches what they can and cannot do. He urged the Commission to exercise such authority with caution.

Senator Roney indicated that in the 1999 opinion, the Court was telling the Commission to be careful of prophylactic rules. He suggested that following the urging of Common Cause and others to enact a rule substantially limiting the class exception will lead to another such opinion. He read from the opinion, as well as from portions of General Commission Advisory No. 13. He noted that Commissioner Cheit has said that people are presumed to know who they elect to office. Commissioner Cheit asked him if there are dangers beyond being overturned by the Court. Senator Roney replied that the legislature controls the Commission's budget and indicated that in the past the Commission and legislature have acted cooperatively.

Commissioner Harsch asked whether the Senate had ever enacted its own rules to regulate conflicts of interest among its members. Senator Roney replied that there were no such rules and the

legislature has relied on the Commission for such regulation. In further response, he indicated that the General Assembly can discipline its members through censure and impeachment, but there are no specific ethics regulations.

The next speaker was Senator David Bates. He advised the Commission that he had started out in an insurance agency in the 1960's and eventually became a lobbyist in the legislature for no-fault auto insurance in Rhode Island. He stated that Governor Sundlun appointed him to a blue ribbon task force out of which came thirty-six auto insurance reform bills. He indicated that he received an advisory opinion which prohibited his participation if he received more than ten percent of his income from that industry. He explained that he did not participate and watched as individuals with no background in auto insurance debated and made false statements. He added that he could not intervene and the bills were defeated.

Senator Bates advised that he has been asked for his advice on legislation while in the Senate. He noted his sixteen years on the Senate Corporations Committee. He stated that the class exception allows him to help the Senate understand the auto insurance industry and related bills. In response to Commissioner Cheit, Senator Bates informed that he was told that he could not discuss, debate or vote. In response to Chair Lynch, he indicated that he received his opinion in 1992.

The next speaker was Sandra Thompson, a member of OCG's Board of Directors. She expressed her disagreement with Senator Roney and stated that she has seen the Commission having problems with the class exception. She noted that two former Commission members recently urged the membership to tackle the issue. Ms. Thompson represented that the Commission exists because of the will of the people and questioned whether the intent of the people is presently being served. She suggested that a review of the laws, which are over twenty years old, is needed. She stated that having a Code of Ethics does not make for a non-corrupt state. She referenced OCG research indicating that Nebraska does not have a Code of Ethics and it is not a corrupt state.

Ms. Thompson suggested that limiting the class exception would not narrow the Code, as the Commission would still be able to investigate a case and take it on its merits. She stated that the Commission is a deliberative body vested by the Constitution with that power. She advised that OCG wants the Commission to eliminate the class exception and strengthen section 7(a). Chair Lynch advised that section 7(a) is not under consideration. Ms. Thompson referenced the complaint against Senator Ciccone and stated that, although there was a clear conflict, section 7(b) applied. She stated that there is no clear definition of what constitutes a class exception, which should be reviewed on a case-by case-basis for a better result. She noted that there has been an increase in the number of recusals filed after the complaints against Senator Celona and Representative Fox.

Ms. Thompson read from section 5(a)'s "financial or otherwise" language and opined that money does not need to change hands. She referenced the example of a Rhode Island senator recently involved with legislation to expunge certain records with the Department of Health, where he himself had prior violations. Commissioner Harsch observed that her comments were directed toward situations involving the legislature and inquired about other state and municipal officials and employees. Ms. Thompson replied that OCG is focused at the state level.

Commissioner Kirby inquired, based upon Mr. Benson's earlier testimony, whether OCG wants a blanket rule with no exemptions. Ms. Thompson indicated that is correct. Commissioner Kirby noted that a town council would not be able to set the municipal tax rate absent some exception, as it would affect the entire membership. Ms. Thompson replied that they were elected with the responsibility to set the tax rate. Mr. Benson addressed the Commission and noted that setting the tax rate would impact everyone. Commissioner Cheit agreed, but he stated that if the class exception were eliminated it would violate the Code. Commissioner Kirby expressed that he does not know how you can avoid having a class exception and suggested that they might need to look at a different type of rule regarding the legislature.

Commissioner Cheit posed the situation where a legislator would

violate the Code, absent the class exception, if he were to vote on a bill to increase the minimum wage and any relative of his had a minimum wage job. Ms. Thompson suggested that common sense would play a role and precedent would be set. Commissioner Cheit replied that any kind of financial benefit would result in a violation.

The next speaker was Robert B. Mann, Esq., on behalf of Working Rhode Island. He referenced his written submission which outlines concerns that Working Rhode Island will not be represented if the class exception is eliminated. He questioned whether the class exception currently would withstand constitutional scrutiny due to the legislative immunity provided to the General Assembly under the Speech in Debate clause of the state constitution. He suggested that the Commission could still make legislators file disclosure, identify their activities and prohibit them from taking bribes. He read from *Eastland v. U.S. Serviceman's Fund* and suggested that the cost of modifying the class exception would be a chilling effect, with legislators less willing to vote on issues or offer advice.

Mr. Mann referenced *Maynard v. Beck* and stated that even if a member of a legislative body has a self interest, he is protected from being questioned by the common law legislative privilege. Commissioner Harsch questioned whether the Rhode Island situation with local legislators would be different because it basically is a unitary state. Mr. Mann replied that he would rather submit something written in more detail, but that the Rhode Island Supreme

Court upheld the privilege in 1999 under pretty strong facts in Maynard.

In response to Commissioner Cheit, Mr. Mann stated that it would not pass constitutional scrutiny if the Commission were to treat unions differently from other issues. He asked the Commission to make available what others have submitted as comments on the class exception. Commissioner Cheit asked Mr. Mann if he believed that voters thought the legislature would be exempt when they put the Commission in the constitution. Mr. Mann replied that the legislature would not be exempt, but it would enjoy immunity as to legislative activity. He stated that the Speech in Debate clause was not repealed by implication.

The next speaker was Representative Joseph A. Trillo. Representative Trillo expressed his belief that there is a monumental problem with conflicts of interest and corruption. He focused on two major problems in the General Assembly. Firstly, he stated that the leadership positions in the legislature carry more power. While no one has to say you can or cannot vote on this, he noted that there is a procedure and everyone understands what happens. He stated that campaign contributions reach legislators and those in the leadership positions are able to stop votes.

Secondly, Representative Trillo informed that groups, such as the unions, put on a concentrated effort to elect their members or

individuals who stand up and support them. He advised that twenty-five to thirty percent of the General Assembly is getting income directly or indirectly from the unions. He suggested that the unions have a stranglehold on the state. He asked the Commission not to buy into the threat of the General Assembly, as delivered by Senator Roney. He indicated that there will be legal challenges because Working Rhode Island has the money to challenge the Commission, but the problem is severe.

Representative Trillo suggested that perhaps the Commission could tailor the rule so that if any group reaches a certain percentage of the General Assembly the exception would not apply. Commissioner Cheit commented that Representative Trillo recently received an advisory opinion which allowed him to participate due to application of the class exception. He replied that his right to speak on legislation in which he has expertise is important, but his right to debate and vote on it is secondary. Commissioner Cheit asked about the voters who had elected the union members and representatives to the legislature. Representative Trillo expressed his view that the average person who votes has no idea what that individual's ulterior motives could be. In further response, he stated his belief that the average voter does not know that the person they elected is a union member.

Commissioner Cheit commented that he is concerned with equating better organized with less ethical. Representative Trillo indicated that

he views the issue in terms of percentages. Commissioner Kirby stated that the voting electorate makes the decision and questioned how the Commission could act to order their disenfranchisement. He added that perhaps a full-time legislature might be the only way to solve this problem. Commissioner Murray noted that there are also firefighters and teachers in the legislature who are union members. He asked whether such membership presents a problem or whether it is really just the few who are union business agents. Representative Trillo replied that the business agents are the problem, but he added the unions go to the teachers and firefighters and get their votes ninety-nine percent of the time.

Chair Lynch agreed with the comments of Commissioners Cheit and Kirby and stated that it may be that the Commission is at an impasse.

The Commission took a brief recess from 10:40 to 10:58 a.m.

The next speaker was Christine Lopes, Executive Director of Common Cause. She urged the Commission to take action on the class exception. In support of the need for action, she referenced the prior day's Providence Journal article reporting on Judge Lisi's instructions to the jury regarding section 7(b) in the federal corruption trial of two CVS executives. She noted that pharmaceutical freedom of choice legislation did not affect all pharmacies. She stated that there has been a public outcry for change.

Ms. Lopes expressed the need for change to occur at the municipal level, also. She stated that School Committee members should not be able to participate in a vote if they or their spouse would benefit. She suggested that there is a loophole that needs to be addressed because presently they can vote on the budget in its entirety. Ms. Lopes indicated that the Commission did not have to adopt the Code proposed by the General Assembly and can change what is set forth in the general laws via regulation.

Ms. Lopes advised that Common Cause has proposed language, as it did last year, in an attempt to tweak the section 7(b) language without tying the hands of government. She noted that a lot has been said regarding the expertise of legislators; however, they can recuse and participate in the public comment portion to share that expertise. Commissioner Cheit commented that the proposal is promising since it understands the need for an exception, but one that is narrower than the present exception. He questioned the use of “general public” language and wondered whether a proposal for a bullet train from Providence to Westerly would qualify, as it would not do anything for many parts of the state. Ms. Lopes suggested that the Commission could determine it on a case-by-case basis. She suggested that the train hypothetical would benefit the general public.

Commissioner Kirby inquired about general public impact involving

legislation that would benefit the elderly, for example. Ms. Lopes indicated that it would depend on whether a direct financial interest could be ascertained. She also noted Common Cause's concern regarding what the Commission had deemed to be a class. Commissioner Cheit questioned whether a union would be a business as defined by the Code. Ms. Lopes suggested that it would be, as it is incorporated by law. Commissioner Cheit indicated that the proposal is a great start and suggested putting the word "taxpayer" in it. He voiced his concern regarding eliminating section 7(b).

Commissioner Binder questioned whether, under the Common Cause proposal, a gay legislator could ever vote on legislation relating to gay marriage. Ms. Lopes suggested that gay marriage would be a social issue and some may argue that there is an impact to the general public. In response to Commissioner Cheit, she stated that the proposal's language was modeled on Massachusetts.

Commissioner Kirby inquired whether Common Cause has a position regarding the "financial benefit" terminology used in the Code. He questioned whether the Commission should be looking at substantial financial benefit or de minimus financial benefit. Ms. Lopes replied that she has not looked at that particular issue, but she suggested that creating very definitive thresholds might work, such as in older advisory opinions stating that a legislator may not participate if a certain percentage of income is derived from that area.

The next speaker was Representative Douglas Gablinske. He also referenced Judge Lisi's jury instructions as to the application of section 7(b) as an example of the consequences of corruption in Rhode Island. He stated that the Commission's decision to dismiss the complaint against Senator Ciccone was consistent with its prior decisions, but he stated that unfairness and blatant conflicts are allowed to continue under the current rule. He stated that he stands by his prior comments regarding sections 7(a) and 7(b), which he distributed to the new members of the Commission.

Representative Gablinske stated that repealing the class exception, which would result in the scenario where officials could not vote to raise or lower taxes, would not make sense. But, he noted that the current rule is equally repulsive and undermines the public trust. He commended the Commission for its adoption of Regulation 7004. Commissioner Cheit expressed his wish that Representative Gablinske would offer a specific proposal. He commented that if the problem is that unions are too powerful, he believes that is a political issue. Representative Gablinske replied that if that is his point, he agrees. Commissioner Cheit indicated that there are reasons to narrow the scope of the exception, but it is not easy to do.

Representative Gablinske advised that he and Representative Trillo have drafted House Bill 8269 which brings back the rule set forth in prior advisory opinions that a legislator may not participate if more

than ten percent of his income is derived from that area. In response to Commissioner Cheit, he stated his belief that the Speech in Debate issue is a smokescreen and that the legislature can be regulated.

The next speaker was Daniel W. Majcher, Esq., Deputy Executive Counsel to Governor Carcieri. Mr. Majcher expressed the Governor's position that a substantial conflict benefiting anyone should be prohibited. He disagreed with the tax rate hypothetical and suggested that if the Commission eliminates the class exception it is up to the Commission to determine what constitutes a substantial conflict. In response to Commissioner Cheit, Mr. Majcher suggested that it would not be a substantial conflict if the benefit were diluted. He stated that the Commission would be afforded deference in interpreting the statute it is charged with enforcing.

Commissioner Cheit questioned how Mr. Majcher could ignore the fact that substantial conflict is a defined term in the statute. Mr. Majcher reiterated his position that the Commission could determine what constitutes a substantial conflict. Commissioner Kirby suggested that perhaps the term "substantial" is in the wrong spot and the statute should say substantial financial gain or loss. Mr. Majcher disagreed. He noted that his memorandum outlines options for the Commission, including elimination of the exception and a re-interpretation of it which would narrow the exception. He suggested that it could be interpreted in a way as to whether there is a significant or insignificant conflict. Commissioner Cheit pointed to

the mandatory statutory language regarding what constitutes a substantial conflict of interest.

Commissioner Binder inquired whether the Governor's Office is suggesting that the Commission reword the statute. Commissioner Cheit noted that Commissioner Kirby's suggestion to have it read substantial financial gain or loss could be useful. Commissioner Kirby observed that they cannot change the statute. He inquired whether the Governor's Office would look into legislation regarding substantial financial interest. Mr. Majcher indicated that it would be helpful to be able to read the other submissions, also.

The next speaker was Frank DeGregorio, a member of Common Cause's Board of Directors. He advised that the class exception also affects the local level and related his personal experience before the Commission in April 2007 regarding local issues in Exeter. He stated that it is an important issue that should be urgently addressed. He suggested that Common Cause's proposal is a realistic solution and asked the Commission to see if they could improve upon it. He added that "financial or otherwise" language should be worked in at the same time. He provided a copy of his prior testimony on the issue to the two new Commission members. In response to Commissioner Kirby, he stated that Common Cause would be amenable to looking at language setting some threshold or a sliding scale. However, he stated his belief that the answer lies in the "or otherwise" language.

The next speaker was Alan Flink, Esq., a member of Common Cause's Board of Directors. He represented that ethics should not be compromised in Rhode Island because the state has a part-time legislature. He noted that application of the class exception is predicated upon a conflict of interest. He suggested that it would be a serious mistake to follow the arguments that Common Cause is targeting unions, as it is targeting conflicts of interest. In response to Commissioner Harsch, he stated his belief that the Commission can change the class exception in a manner facially inconsistent with the statute. He noted that the Speech in Debate issue has come up and, although he does not dismiss it, Common Cause is bound to deal with the law as it is and not how it may be changed by the judiciary.

Mr. Flink expressed that it would be a mistake for Rhode Island to further fragment itself with language dealing with impact to "taxpayers" as opposed to the "general public." Commissioner Cheit noted the hypothetical situation of a vote on legislation benefiting all persons over sixty-five, which, under Common Cause's proposal, would provide that legislators over sixty-five could not vote. Mr. Flink stated his belief that the benefit would inure to the general public, given that everyone would benefit upon attaining said age. Commissioner Harsch asked Mr. Flink for his views on Judge Lisi's jury instructions, which were referenced by many of the speakers. Mr. Flink declined to comment. Commissioner Harsch expressed his view that it is important to the Commission's work that she views

Rhode Island law as being this way. Commissioner Cheit noted that the Commission fined John Celona \$130,000, although it does not have jurisdiction over CVS.

Chair Lynch thanked all of those who presented public comment. Commissioner Cheit requested that the Staff give some thought regarding the issue of substantial conflict, as articulated by Commissioner Kirby, and whether the Commission could look at it as an alternative. Commissioner Kirby asked about the term of art “similarly situated members” as it appears in section 7(b) and whether the Commission needs to define it. Commissioner Cheit added that the language “member of the class” appears, too.

At approximately 12:09 p.m., upon motion made by Commissioner Cheit and duly seconded by Commissioner Murray, it was unanimously

VOTED: To go into Executive Session pursuant to R.I. Gen. Laws § 42-46-5(a)(4), to wit:

a.) Motion to approve minutes of the Executive Session held on May 20, 2008.

b.) Motion to return to Open Session.

The Commission reconvened in Open Session at approximately 12:10

p.m., without the presence of Commissioner Cheit. Chair Lynch reported that the Commission approved minutes of the Executive Session held on May 20, 2008.

***Legal Counsel Managhan left the meeting at 12:12 p.m.**

The next order of business was New Business. Senior Staff Attorney D'Arezzo inquired whether the Commission wished to schedule a separate meeting date for the adjudication of In re: Joseph S. Larisa, Jr. . The consensus was to schedule the adjudication for a regular meeting date, with July 22, 2008 being the next available date.

At approximately 12:15 p.m., upon motion made by Commissioner Binder and duly seconded by Commissioner Kirby, it was unanimously

VOTED: To adjourn.

Respectfully submitted,

Ross Cheit
Secretary